BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the: Appeal from Board of Stewards Ruling # 26, Pacific Racing Association, Dated April 26, 1998 BRIAN KORINER, Appellant.	Case No. SAC 98-033 OAH No. N 1998070296

PROPOSED DECISION

Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, heard this matter on December 7, 1999, in Oakland, California.

Mark D. Johnson, Deputy Attorney General, represented the California Horse Racing Board.

Appellant Brian Koriner was represented by David M. Shell, Esq., 8788 Elk Grove Boulevard, Building 2, Suite F, Elk Grove, California 95624.

Submission of the matter was deferred pending receipt of briefs that had previously been submitted in this matter. Respondent's Brief on Appeal was received from the California Horse Racing Board and marked as Exhibit I for identification. No brief was received from appellant. The case was submitted for decision on December 10, 1999.

BACKGROUND

On April 4, 5 and 24, 1998, the Board of Stewards (Stewards) of the California Horse Racing Board (Board) conducted a hearing in response to a complaint filed against trainer Brian Koriner (appellant). The complaint alleged violation of specified provisions of California Code of Regulations, Title 4, Division 4. (Rules.)

On April 26, 1998, the Stewards issued Ruling No. 26, providing as follows:

> "Trainer **BRIAN KORINER**, who started the horse **CASTAN**, sixth place finisher in the sixth race at Bay Meadows Race Course on November 8, 1997, is fined the sum of one thousand dollars ($1,000.00)* pursuant to California Horse Racing Board rule #1887(a) (Trainer to Insure Condition of Horse) for violation of California Horse Racing Board rule # 1843(d) (Medication, Drugs and Other Substances: Procaine – In excess of specified level)."

(Footnote omitted.)

An appeal was timely filed from the Stewards' ruling and it was heard before Administrative Law Judge Ruth S. Astle on August 27, 1998. After hearing, Judge Astle remanded the matter to the Stewards so that the requirements of Government Code sections 11425.10 and 11425.50 might be satisfied. Her decision was adopted by the Board on December 4, 1998.

On March 17, 1999, the Stewards issued a "WRITTEN DECISION." It includes Findings of Facts, Conclusion and the original April 26, 1998 Order imposing a one thousand dollar ($1,000.00) fine. It is from this Decision and Order (Ruling No. 26) that appellant brings this appeal.

The Stewards made the following Findings of Fact:

1. Trainer Brian Koriner trained the horse Castan and entered the horse to run in the sixth race on November 8, 1997 at Bay Meadows Race Course.

2. Castan ran in the sixth race, finished in sixth place and a post race urine sample (labeled #H62171) was taken from the horse and shipped to Truesdail Laboratory for testing.

3. The urine sample was tested by Truesdail Laboratory and test analysis confirmed the presence of procaine in the test sample.

4. Procaine was not detected in the blood sample taken from Castan after the race.

5. Evidence was submitted and testimony given by Norman E. Hester, Ph.D., Technical Director for Truesdail Laboratory that test results of tests performed on urine sample H62171 confirmed the presence of procaine at an amount that exceeded the 10 nanogram per milliliter level as permitted by Rule 1844(e)(3).

6. Testimony was given by Official Veterinarian Christine Cornish, D.V.M. that procaine is listed as a class III drug and could affect the performance of a horse.

7. Dr. Cornish gave testimony that procaine has the drug properties that act as an anesthetic that will depress pain and the properties that can affect the central nervous system and cause excitement.

8. The drug procaine can be mixed with penicillin and administered as a therapeutic treatment.

9. No evidence was submitted that revealed any therapeutic treatments that would contain the drug procaine prior to the horse running.

10. No drugs or medication were found at Mr. Koriner's barn that contained the drug procaine.

11. Mr. Koriner has been licensed as a trainer for approximately nine years and has never had a drug violation that contained a class I, II or III drug.

12. Mr. Koriner has security at his barn and medications at his barn are in a secure area.

The Stewards made the following observations and conclusions:

> "Findings of Facts show Mr. Koriner was the trainer of the horse Castan, he entered the horse to race, the horse raced and the post race urine test submitted by the horse was proven to have the class III drug substance Procaine in the sample in excess of the 10 nanogram per milliliter level authorized in California Horse Racing Board rule #1844 (Authorized Medication). …
>
> In this case there is no known source as to how the horse got procaine in its system; however, it did race with the substance in its system. In mitigation, the fact that Mr. Koriner's license history, showed no prior violations for class I, II or III drug substances, was given consideration. As set forth in Findings of Fact [1, 2, 3, 5, 6 and 7] pursuant to rule 1887 this Board finds Mr. Koriner in violation of rule 1843(d)."

He was then fined one thousand dollars ($1,000.00).

Appellant filed a timely appeal from the Stewards' ruling.

STANDARD OF REVIEW

Under Rule 1761, every decision of the Stewards, except a decision concerning disqualification of a horse, may be appealed to the Board. Under Business and Professions Code section 19517, the Board may overrule a Stewards' decision if a preponderance of the evidence shows the Stewards mistakenly interpreted the law, if new evidence of a convincing nature is produced, or if the best interests of racing and the state may be better served. On appeal the burden is on the appellant to prove the facts necessary to sustain the appeal. (Rule 1764.)

REVIEW

A. Failure to Adopt Penalty Regulations

Appellant contends that the Board may not impose any penalty in this case because it has failed to adopt penalty regulations as required by law. Specifically, appellant relies upon subsection (a) of Business and Professions Code section 19580 which states that:

> The board shall adopt regulations to establish policies, guidelines, and *penalties* relating to equine medication in order to preserve and enhance the integrity of horseracing in the state.

(Emphasis added.)

Additionally, subsection (a) of Business and Professions Code section 19582 provides that violations of section 19581 "are punishable as set forth in regulations adopted by the board." He further notes that Article 6 of the Administrative Adjudication Bill of Rights, subsection (e) of Government Code section 11425.50 provides:

> A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

In fact, the Board did submit proposed regulation 1843.3 governing disciplinary action for medication violations, but it was rejected by the Office of Administrative Law. From 1991, the time that the California Legislature rewrote the equine medication law

(Article 8.5 of the Bus. & Prof. Code, §§19580 – 19583), to present the Board has not adopted regulations governing imposition of penalties relating to equine medication. By continuing to rely upon a proposed regulation (Rule 1843.3) appellant argues that the Board's penalty is based upon an underground regulation and that its decision must therefore be overturned.

The idea behind adopting regulations to formalize penalty guidelines is to provide notice to potential offenders of consequences for disobeying the law/regulations. If a penalty is based on an "underground rule" – one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act – a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the only reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. (See Cal. Law Revision Com., Gov. Code, § 11425.50(e); *Armistead* v. *State Personnel Board* (1978) 22 Cal.3d 198.)

In Finding 11, the Stewards note that appellant has been licensed as a trainer for approximately nine years and has never had a drug violation that contained a class I, II or III drug. Such was given consideration in setting the amount of the fine along with his licensing record admitted as Exhibit 6. It showed that he suffered a $300 fine and then a $500 fine for excessive Bute tests on two different horses in 1997. Under proposed Rule 1843.3 a first Class III offense is punishable by a sixty day to six month suspension, and/or fine up to $1,500.

Although the Board has failed to adopt penalty regulations as required under section 19580 of the Business and Professions Code, it is apparent that the penalty imposed by the Stewards is neither unreasonable nor is it one that was arrived at by the Stewards' adherence to Board penalty guidelines. Appellant's argument that the Board has no authority to impose any penalty prior to its adoption of regulations is not persuasive. Such an interpretation of section 19580 would essentially strip the Board of powers necessary and proper to enable it to carry out fully its responsibilities to protect the public. (See Bus. & Prof. Code, §§ 19440, 19401.) The Legislature could not have intended such result.

B. Validity of Board Regulations

Appellant also contends that the regulations that were adopted by the Board go well beyond what the Legislature authorized. He argues that they do not take into account the time of administration of drugs as provided by the governing statute, Business and Professions Code section 19581. This section provides in part:

> No substance of any kind shall be administered by any means to a horse after it has been entered to race in a horserace, unless the board has, by regulation, specifically authorized the use of the substance and the quantity and composition thereof.

Under Rule 1843.5 a horse is deemed to be "entered" in a race 48 hours before post time of the running of such race. Appellant's concern is that under Rule 1843, a finding that a test sample taken from a horse contains a drug substance is considered prima facie evidence that the responsible trainer has been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.[1] Such, he argues, fails to take into account the actual time of administration of the drug, making language in Business and Professions Code section 19581 relating to drug administration irrelevant.

Although a laboratory finding may be accepted as prima facie evidence of drug administration, any presumption of negligence in the care of the horse or in the administering of a drug substance that arises from Rule 1843 is not conclusive. It is subject to challenge and appellant could certainly have offered evidence relevant to the time of drug administration at the Stewards hearing. In this case no evidence was submitted that revealed any therapeutic treatments that would contain the drug procaine prior to the horse running. No drugs or medications were found at appellant's barn that contained the drug procaine. He maintains security at his barn and medications are in a secure area. The Stewards included these findings in their decision. Appellant also had the opportunity to offer new evidence of a convincing nature on appeal before the Board. Thus, Rule 1843 did not preclude appellant from offering evidence relevant to the issue of time of administration of a drug substance.

The Stewards clearly have discretion in determining what penalty to impose upon a trainer after a finding of a prohibited drug substance.[2] Imposition of fines, suspensions or revocation is discretionary, not mandatory. It would therefore follow that the time of

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[1] Rule 1843(d) provides: "A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance or a finding of a drug substance in excess of the limits established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse."

[2] Thus, Rule 1887 provides in relevant part: "Should the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance as defined in Rule 1843.1, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off; and, in addition, the owner of the horse, the foreman in charge of the horse, the groom, and any other person shown to have had the care or attendance of the horse may be fined, his/her license suspended, revoked, or be ruled off."

administration of a drug substance, if known, would be a relevant factor in determining the culpability of a trainer or others. It would also be considered in determining what discipline, if any, should be imposed in a given case.

When viewed in context of appellant being given an opportunity to offer evidence on time of administration, the presumption created by Rule 1843 is not unreasonable. A test sample found to be positive for a prohibited drug substance is prima facie evidence that the drug substance has been administered to the horse. But any presumption of negligence in the care of the horse or in the administration of the drug substance is not conclusive, and it is subject to challenge at hearing or on appeal.

Finally, even if it were determined that Rule 1843 conflicted with Business and Professions Code section 19581, the validity of these laws and regulations cannot properly be challenged at administrative hearing absent authority for such review in a statute or regulation. (*Tidewater Marine Western, Inc.* v. *Bradshaw* (1996) 14 Cal.4th 557; *Smith* v. *Vallejo General Hospital* (1985) 170 Cal.App.3d 450.)

C. Sufficiency of the Evidence

The Standard of Review

As this is an appeal pursuant to Rule 1761 from a Stewards' decision following an evidentiary hearing, the standard of review to be applied concerning evidence is the substantial evidence test. This review is analogous to the review engaged in by the superior court when reviewing an administrative agency's decision under Code of Civil Procedure section 1094.5, subdivision (c). (*Powers* v. *City of Richmond* (1995) 10 Cal.4th 85, 93; *Jones* v. *Superior Court* (1981) 114 Cal.App.3d 725.) Under the substantial evidence test the evidence is not reweighed, nor may the reviewing court substitute its findings or inferences for those of the agency. It is for the agency to determine the weight to be given to conflicting evidence. (*Sierra Club* v. *California Coastal Com.* (1993) 12 Cal.App.4th 602, 610.)

A further review is to be made into whether the findings made by the Stewards support the decision. (*Topanga Assoc. for a Scenic Comm.* v. *County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) Thus, a court may reverse an agency's decision if, based on the evidence before the agency, a reasonable person could not reach the same conclusion reached by the agency. (*McMillan* v. *American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 186.)

Review

Truesdail Laboratories, Inc. Report. Appellant contends that laboratory documents admitted on the basis of testimony of the laboratory's director, Norman Hester, Ph.D., are inadmissible as hearsay. As technical director of the laboratory, Dr.

Hester testified generally to the Truesdail laboratory procedures for receiving, logging and testing of samples received by the laboratory. He did not personally conduct the laboratory tests on the samples drawn from CASTAN, and appellant argues that without such personal knowledge of the particular testing done in this case, he cannot properly testify to the time or mode of preparation of laboratory documents/findings relating to CASTAN.

The Truesdail laboratory reports were properly admitted as business records under Evidence Code section 1271, which states:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Dr. Hester testified that the report was made in the regular course of Truesdail Laboratory's business as a testing laboratory, that the document was prepared after the test results had been obtained and reviewed and he testified as to its identity and mode of preparation as well as the sources upon which it was based.

The testing had been performed utilizing multiple thin-layer chromatography, and gas chromatography/mass spectrometry and clinical refractometer. The procaine found in the CASTAN urine sample measured out at 34.66 nanograms per milliliter. Subdivision (e) of Rule 1844 provides that official urine test samples may contain procaine in an amount that does not exceed 10 nanograms per milliliter. Dr. Hester personally reviewed the test results. He was qualified to testify as to the laboratory results of the CASTAN urine analysis contained in the data packet. As technical director of Truesdail Laboratory, and as one who personally reviewed the test results in this case, Dr. Hester properly served as an "other qualified witness" who could testify to the identity of the Truesdail Laboratory documents and their mode of preparation within the meaning of Evidence Code section 1271.

There was no requirement that other employees of Truesdail Laboratory be brought in to testify as to their involvement in conducting every single laboratory test. (*People* v. *Crosslin* (1967) 251 Cal.App.2d 968.) The California Supreme Court recently noted that Evidence Code section 1271 does not require that the person who prepared the business record testify regarding its contents, and that where the contents

of a business record carry sufficient indicia of reliability, the confrontation clause is satisfied and the record may be admitted under this "firmly rooted" exception to the hearsay rule. (*People* v. *Beeler* (1995) 9 Cal.4th 953, 979.)

Appellant stipulated to the chain of custody of the sample from the time it was taken by the urine collector through its arrival at Truesdail Laboratory. As to appellant's objection over the lack of other Truesdail Laboratory witnesses to testify to the chain of custody of the sample at the laboratory, the record contains substantial evidence that the sample from CASTAN was coded, sealed, shipped and received under secure conditions with clear identifying information. In this case the absence of any report of problems, and verification in the business record that all samples in the shipment had been found intact, constitutes substantial evidence in support of the Stewards' finding that urine sample (#H62171) which tested positive for procaine in excess of 10 nanograms per milliliter was taken from CASTAN.

Testing Error. Appellant argues that the test results are not reliable because there was no independent showing that the standards against which the samples were tested provided an accurate measure for procaine. To quantify a drug substance, samples must be measured against a known standard. Truesdail Laboratory obtains procaine in pre-measured amounts from an outside chemical supply house. Truesdail technicians then prepare the standard by spiking a clean urine sample with this measured amount of procaine. They rely upon the chemical supply house to provide accurately measured amounts of procaine. Dr. Hester acknowledges that if the standard were off, the test results would likewise be off.

There is also the issue of degradation. If the potency of the standard degrades over time, then the procaine in the sample being measured would appear to be higher than it actually is. Thus, if a 10 nanograms per milliliter standard degraded to half that amount, a 5 nanogram per milliliter sample might actually be measured at the 10 nanogram per milliliter level. Appellant's point is that without an independent showing that the standard being used is accurate, the test results are simply not a reliable measure for procaine in excess of 10 nanograms per milliliter.

The laboratory protocols followed in this case were both adequate and reasonable. It was not necessary that another witness be called to testify to the mode of preparation and accuracy of the procaine standard obtained from the chemical supply house. The procaine was added to the clean urine sample at the time of testing, so there would be no significant sample degradation on account of the urine solution. Dr. Hester suspects that sample degradation of procaine in isolation is probably not more than five or ten percent. The amount measured in this case exceeded accepted levels by a magnitude greater than three. Confirmation was received from a second laboratory. A

split sample measured by Post Analysis, Inc. did not find procaine under the ten nanograms per milliliter level.[3]

By reason of the above there is substantial evidence in the record for the Stewards to find that the means employed by Truesdail Laboratory to quantify procaine in the urine sample were reliable.

Stewards' Conclusion and Order. The Stewards found violations of Rule 1843(d) and 1887(a). Rule 1887(a) provides as follows:

> "The trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. Should the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance as defined in Rule 1843.1, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off; and, in addition, the owner of the horse, the foreman in charge of the horse, the groom, and any other person shown to have had care or attendance of the horse may be fined, his/her license suspended, revoked, or be ruled off."

The Stewards' findings support their conclusion that appellant violated Rule 1887(a). The Stewards' findings also support their conclusion that appellant violated Rule 1843(d) which provides:

> "A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance or a finding of a drug substance in excess of the limits established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse."

LEGAL CONCLUSIONS

A review of the entire record before the Board of Stewards does not find any error of law requiring reversal. The review does reveal that substantial evidence

[3] The Post Analysis, Inc. report may be considered as hearsay evidence "used for the purpose of supplementing or explaining other evidence" under subsection (d) of Government Code section 11513.

supports the Stewards' findings, and that those findings support the determination that cause for discipline exists for violation of Rule 1843, subdivision (d), and Rule 1887, subdivision (a). The penalty imposed was proper.

ORDER

The Board of Stewards Ruling #26, Pacific Racing Association, dated April 26, 1998, against trainer Brian Koriner is affirmed.

DATED: _____

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JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings